

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SINGH v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 1821

MIGRATION – Review of decision of MRT – spouse visa – where Tribunal not persuaded of parties mutual commitment to a shared life – whether Tribunal’s decision was the product of *Wednesbury* unreasonableness.

Migration Regulations 1994

Dhillon v Minister for Immigration [1999] FCA 1878

Applicant:	SUKHDEV SINGH
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File number:	SYG 2287 of 2006
Judgment of:	Raphael FM
Hearing date:	24 October 2007
Date of last submission:	24 October 2007
Delivered at:	Sydney
Delivered on:	24 October 2007

REPRESENTATION

Solicitors for the Applicant:	Jack Singh & Co
Counsel for the Respondent:	Mr T Reilly
Solicitors for the Respondent:	Australian Government Solicitor

ORDERS

- (1) Application dismissed.
- (2) Applicant pay the first respondent's costs assessed in the sum of \$4,500.00.
- (3) The name of the first respondent be amended to the Minister for Immigration & Citizenship.
- (4)

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG2287 of 2006

SINGH
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
First Respondent

REASONS FOR JUDGMENT

1. In this application Mr Singh seeks a review of a decision made by the Migration Review Tribunal on 29 June 2006 affirming a decision of a delegate not to grant his wife a Partner (Provisional) (Class UF) visa.
2. A short history of the visa applicant (the wife) and the sponsor's relationship is set out at [CB 150]. The wife arrived in Australia in April 1993 and met the sponsor in South Australia in March 1994. They were married on 17 April 1994 by an Australian marriage celebrant and registered their marriage on 7 May 1994.
3. In August 1994, probably for reasons alluded to in the delegate's decision at [CB 107], the wife left Australia. On 8 December 1994 a partner migration application was lodged by her but not accepted. A further application was lodged on 1 December 1997 and that was

refused in September 1999. In July 2001 the sponsor, Mr Singh, went to India for about seven months. He has not returned to India and the parties have not lived together since then.

4. The Tribunal accepted that the parties are not well educated. Mr Singh would appear to be illiterate and the wife appears to be able to write but possibly cannot read very well. The sponsor was aware that in order to obtain a visa the Minister must be satisfied that the wife applicant was at the time of the application a spouse of the review applicant within the meaning of r.1.15A of the *Migration Regulations 1994*.
5. There are a number of criteria within those regulations which indicate tests that should be applied when considering whether or not an applicant is a genuine spouse or, as the Tribunal noted from the decision of *Dhillon v Minister for Immigration* [1999] FCA 1878:

“The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others”.

6. Having noted that test the Tribunal then sets out in its decision to assess the various factors which guided it before coming to a conclusion. The Tribunal had before it evidence filed on behalf of the sponsor such as bank accounts, letters, cards, telephone details, statutory declarations from relations and letters of support from the Sikh centre in Sydney. There were also produced to the Tribunal some letters from Dr Chaudhary and a Dr Sarfaz which indicated that the sponsor was suffering from depression and associated infirmities.
7. The Tribunal commented in relation to the financial aspects of the relationship that the joint account with the ANZ that had been produced and the Commonwealth Bank draft money orders really only dealt with the period between 2002 and 2004. Although there was evidence from the sponsor's brother and his uncle that money had been given to the wife:

“*The Tribunal has considered the relatives' oral evidence but the Tribunal is not satisfied they gave money to the visa applicant because she is the spouse. It is entirely plausible that this was a gesture of kindness and altruism.*”

8. The Tribunal also noted that although the parties have been married since 1994 there was no joint ownership of any property either in India or Australia and suggested that as a result there was little financial commitment. As the sponsor's counsel has pointed out, not too much in the way of financial commitment could be expected from an Indian currently living on the support pension in Australia and another Indian living in a small village in India. Whilst I might disagree with the Tribunal's view that:

"In essence the Tribunal is satisfied that in consideration of the evidence as whole the limited financial transactions indicate a significant lack of financial commitments supporting a finding that the relationship is not genuine."

9. it cannot be said that the Tribunal did not take into consideration the financial situations of the parties before coming to that conclusion.
10. The next matter considered by the Tribunal was the nature of the household. It noted that although the sponsor had provided copies of phone cards and stated that he had used public phones to contact the wife it was not satisfied that the nature of the household demonstrates a genuine marital relationship because the couple had lived apart in two different countries for many years.
11. The Tribunal then goes on to consider the social aspects of the relationship, noting the evidence that it had of the wedding ceremony and from the sponsor's brother and uncle contending to the genuineness of the relationship. In regard to this it says:

"Whilst the Tribunal accepts there is evidence supporting recognition of the marriage by others the Tribunal is satisfied that this aspect, without more, does not necessarily mean that the marriage is genuine. In any case, this is a factual matter for the Tribunal determination. In consideration of the evidence as a whole the Tribunal is satisfied that the nature of the social aspects of the relationship does not demonstrate a genuine marital relationship."

12. The Tribunal considers the nature of the parties' commitment to each other and refers to discussions between it and the sponsor indicating that some of the evidence produced by him appeared rather impersonal:

"In the opinion of the Tribunal it is difficult to accept that a spouse would write in that manner which the Tribunal considers to be detached and impersonal, inconsistent with a marital relationship. The review applicant has provided a number of letters supporting recent communication but in consideration of the evidence as a

whole, the Tribunal is not satisfied that the letters are evidence of a genuine relationship. They are merely evidence of communication, mostly recent, which raises doubts about the intention. In the course of the hearing, the review applicant was asked by the Tribunal and he gave evidence that the visa applicant does not know "much" about his clinical conditions. He said he has told her "nothing" about the clinical conditions identified by Dr Chaudhary. The Tribunal is of the view that in a genuine marital relationship, partners generally share personal information such as medical and psychological conditions. The Tribunal is satisfied that this issue provides further support for the Tribunal's finding that the marriage is not genuine."

13. The Tribunal makes a final finding that the visa applicant and the review applicant lived in different countries and that at the time of the application and decision the Tribunal is satisfied:

"That they did and do live separately and apart on a permanent basis. Accordingly they do not satisfy the requirements of r.1.15A(1)(b)(iii) for a married relationship."

14. It was submitted on behalf of the wife by the sponsor, that the Tribunal did not take into account all the facts relating to the bank accounts, the money sent to the wife, the New Year's card, the affidavits of persons who attended the ceremony, the photos of the ceremony and the brother's evidence and the brother's wife's evidence, which proved the relationship. Not taking account of relevant evidence is, of course, a failure to complete the task which the Tribunal is required to perform.
15. If these matters have been taken into account then unless one can get to a stage of establishing some form of *Wednesbury* unreasonableness it is difficult to find grounds for jurisdictional error, even if it could well be said that a more sympathetic Tribunal, taking into account all the facts known and in particular the wife's attempts to obtain a visa such as this over the last 13 years, might have made a completely different decision.
16. Whilst I have concern about the manner in which the Tribunal came to its conclusions in relation to the social aspects of the relationship it cannot be said that any of the matters referred to by the applicant's counsel were not considered. They were all considered and they were all found to be unable to allow the Tribunal to enter into the state of satisfaction required by the *Migration Act 1958* (the "Act").

17. The sponsor points out that whilst the Tribunal makes comment about the length of time the parties stayed together and notes the provisions of r.1.15A(5):

“That if two persons have been living together at the same address for six months or longer that fact is taken to be a strong evidence that the relationship is genuine and continuing”-

18. the Tribunal did not take into account the total period of living together in both Australia and India. It is clear from the Tribunal's decision at [CB 150] that the Tribunal was aware of those periods of living together but the transcript which was provided to me by the sponsor indicates a rather confusing debate between the sponsor and the Tribunal as to whether the parties did live together whilst they were in India. It could be said that it was open to the Tribunal to come to a view that they did not live together continuously for six months, and of course even if the Tribunal had determined that they did do so, that fact is not conclusive of the existence of a genuine and continuing relationship.
19. With respect to the sponsor's counsel it does seem to me that his eloquence would have been put to better use before the Tribunal which he might have persuaded of the genuineness of his client's marriage. Before me today, I regret he has been unable to identify a jurisdictional error. Claims of *Wednesbury* unreasonableness have a very chequered history in Australian administrative law. It seems to me that it would require more than the submissions made to reach a state of satisfaction that the Tribunal decision should be reviewed on that basis.
20. I dismiss the application. I order that the applicant's pay the first respondent's costs assessed in the sum of \$4,500.00. I order that the name of the First Respondent be amended to Minister for Immigration & Citizenship.

I certify that the preceding eighteen (18) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: